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In the
Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
NICHOLAS KRISTOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN J. HATFILL, Plaintiff-Appellant
v.
THE NEW YORK TIMES COMPANY, Defendant-Appellee, and NICHOLAS KRISTOF, Defendant.

No. 07-1124, No. 07-1162

March 21, 2008, Argued
July 14, 2008, Decided

Before: NIEMEYER and MICHAEL, Circuit Judges, and BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Judge Niemeyer wrote the opinion, in which Judge Michael and Senior Judge Beam joined.

NIEMEYER, Circuit Judge

OPINION

In the days and weeks following the 9/11 attacks on the World Trade Center and the Pentagon, someone sent letters laced with the deadly toxin anthrax through the U.S. mails to members of Congress and news organizations, and five people

who handled the mail died from contact with the anthrax.

In the months that followed, Nicholas Kristof, a columnist whose articles appeared in the editorial section of *The New York Times*, criticized the FBI's investigation of the attacks as "lackadaisical" and "lethargic", "threaten[ing] America's national security," and, over a series of articles, Kristof began presenting evidence that pointed to Dr. Steven J. Hatfill, a biodefense research scientist, as a suspect. Even though Kristof acknowledged that by the time of his final article in August 2002, the FBI was improving, he demanded that the FBI either exculpate Dr. Hatfill or arrest him to "end this unseemly limbo."

Dr. Hatfill commenced this action against The New York Times Company, alleging that Kristof's columns were defamatory in that they "effectively" accused him of the crimes "in the mind of a reasonable reader." The district court granted The New York Times Company's motion for summary judgment, concluding that Dr. Hatfill was a "public official" or a "public figure" and that as a public official or public figure, he was required to demonstrate that The New York Times Company published the columns with "actual malice" in that it had knowledge that Kristof's columns were false or was reckless by disregarding whether they were false. Because Dr. Hatfill failed to demonstrate actual malice, the district court entered judgment for The New York Times Company.

On appeal, we affirm. Because Dr. Hatfill voluntarily thrust himself into the controversy surrounding the threat of bioterrorism and the

nation's lack of preparedness for a bioterrorism attack, we agree with the district court's finding that he was a "limited-purpose public figure" and therefore was required to show actual malice. And because Dr. Hatfill did not demonstrate actual malice, the district court properly entered judgment in favor of The New York Times Company. We also conclude that Dr. Hatfill did not present evidence sufficient to prove intentional infliction of emotional distress.[1]

I

On September 18, 2001, and again on October 9, 2001, someone, who has not yet been identified, sent letters laced with the deadly toxin anthrax through the U.S. mails to members of Congress and news organizations. Five people who handled the mail died from contact with the anthrax. In addition, Congress was forced to close and the U.S. Postal Service was severely disrupted.

In response to these anthrax attacks, reporters began to discuss the nation's vulnerability to bioterrorism and its unpreparedness for a bioterrorist attack. They also began to criticize the slow investigation being conducted by the FBI into the attacks. Nicholas Kristof, a regular columnist in

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[1] The New York Times Company filed a conditional cross-appeal ("if . . . the judgment is reversed") from the district court's orders requiring it to disclose its confidential sources. Because we affirm the district court's summary judgment in favor of The New York Times Company on the merits, we do not reach the question of whether the district court acted contrary to law when it ordered The New York Times Company to disclose the identities of its confidential sources.

the editorial section of *The New York Times*, was one such writer.

In a series of five columns appearing in *The New York Times* from May 2002 to August 2002, which are fully described in our earlier opinion, *Hatfill v. N.Y. Times Co.*, 416 F.3d 320, 325-28 (4th Cir. 2005), Kristof used information provided by experts and other sources to profile a suspect in the attacks, ultimately focusing on Dr. Steven J. Hatfill, a biodefense research scientist. With each publication, Kristof identified new evidence suggesting Dr. Hatfill as a prime suspect. The columns noted that Dr. Hatfill had access to anthrax, had knowledge of how to make it, and had a motive. In the same columns, Kristof criticized the FBI for not investigating the facts against Dr. Hatfill. He characterized its investigation as "lackadaisical" and "unbelievably lethargic" and admonished that the FBI's investigatory attitude "continues to threaten America's national security." By August 13, 2002, however, when Kristof wrote his last column on this issue, he observed that the FBI had appreciably intensified its investigation, leading Kristof to conclude, "there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him."

Dr. Hatfill commenced this action against The New York Times Company ("The New York Times" or "The Times"), alleging claims under Virginia law for defamation, defamation per se, and intentional infliction of emotional distress. In Count I of his complaint, he alleged that The New York Times' "false and reckless public identification of Dr. Hatfill with the anthrax mailings, both directly and by

implication from the manner in which his personal and professional background were presented in [Kristof's] columns, constituted a false factual allegation of terrorist and homicidal activity and impugned Dr. Hatfill's good name as a citizen, a physician and a bio-medical researcher to a reasonable reader." Count II alleged that each of eleven discrete factual misstatements in the five columns "constituted defamation per se, that, in the mind of the reasonable reader, would tend to incriminate Dr. Hatfill in the anthrax mailings." Finally, Count III alleged that "Kristof's intentional public identification of Dr. Hatfill with the anthrax murders" constituted intentional infliction of emotional distress.

The district court originally granted The New York Times' motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), concluding that the complaint did not state a claim on which relief could be granted. On appeal, we reversed, finding that Kristof's columns were capable of defamatory meaning under Virginia law and that if defamatory, they could be sufficiently outrageous to rise to the level necessary for a finding of intentional infliction of emotional distress under Virginia law. *Hatfill*, 416 F.3d at 332-37.

During discovery after remand, Dr. Hatfill moved to compel The New York Times to disclose the identity of five confidential sources from whom Kristof allegedly obtained some of the information for his columns, and the district court granted the motion, after three of the sources had voluntarily revealed their identities. But The New York Times still refused to disclose the two unrevealed sources,

and the district court sanctioned The Times. The court ordered that The Times could not refer to, rely on, or enter into evidence any information from those unrevealed sources.

Following the completion of discovery, the district court granted The New York Times' motion for summary judgment, concluding (1) that Dr. Hatfill was a "public official" and therefore had to demonstrate that The New York Times published the columns with "actual malice" -- i.e., that The Times had knowledge that the columns were false or published them with reckless disregard of whether they were false; (2) that Dr. Hatfill was also a "limited purpose public figure" and therefore again had to show "actual malice"; and (3) that Dr. Hatfill had not shown that The New York Times' columns were published with knowledge that they were false or with reckless disregard of whether they were false. For similar reasons, the court also concluded that Dr. Hatfill could not succeed on his claim for intentional infliction of emotional distress.

From the district court's judgment in favor of The New York Times, dated January 30, 2007, Dr. Hatfill appeals, contending (1) that he is neither a public official nor a public figure; (2) that the evidence in any event demonstrates actual malice; (3) that the evidence Dr. Hatfill advanced was sufficient to support his claim for intentional infliction of emotional distress; and (4) that the district court erred in granting summary judgment despite The Times' refusal to disclose Kristof's sources.

II

We do not, on this appeal, address whether Dr. Hatfill presented evidence sufficient to prove his defamation claims under Virginia law. Rather, we address the dispositive issue of whether Dr. Hatfill was a "public official" or "public figure," requiring him to prove that The New York Times acted with "actual malice" in publishing the Kristof columns.

A

As an accommodation to the *First Amendment's* protections of free speech and press, the Supreme Court has held that "public officials" and "public figures" must prove, as part of a defamation case, that the defendant's allegedly defamatory statement was made with "actual malice," meaning that it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) (as to a "public official"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring in the result) (as to a "public figure"); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334-37, 342-43 (1974); *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994). Under this standard, it is not enough for a plaintiff to prove simply that the defendant failed to investigate or to check the accuracy of a false statement. *Gertz*, 418 U.S. at 332, 334-35 n.6. The standard requires that the defendant have a "subjective awareness of probable falsity" of the publication. *Id.* at 335 n.6 (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). In addition, the element of "actual malice" must be proved by clear and convincing evidence. *Gertz*, 418 U.S. at 342; *Foretich*, 37 F.3d at 1551.

This compromise that limits a State's interest in preventing and redressing injuries to individuals' reputations in favor of society's interest in uninhibited, robust, and wide-open debate on public issues recognizes that public officials and public figures[2] have "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Gertz*, 418 U.S. at 344 (footnote omitted). In addition, because public officials and public figures have generally chosen to

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[2] A *public official* is one who has a *governmental role* and whose "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Such interest must go "beyond the general public interest in the qualifications and performance of all government employees." *Id.* "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Gertz*, 418 U.S. at 344. For a public official, "society's interest . . . is not strictly limited to the formal discharge of official duties," but "extends to 'anything which might touch on an official's fitness for office,'" *id.* at 344-45 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), and the Supreme Court has noted that "[f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Garrison*, 379 U.S. at 77. A *public figure*, on the other hand, need not hold an important governmental office or serve an important governmental role. Public figures are persons who "have assumed roles of especial prominence in the affairs of society." *Gertz*, 418 U.S. at 345.

enter the public arena, they have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." *Id.* at 345.

Notwithstanding these generalities, the Supreme Court has subdivided the class of public figures for determining when public figures are subject to the actual malice standard. In *Gertz*, the Court explained that some public figures have assumed roles "of such persuasive power and influence that they are deemed public figures *for all purposes.*" 418 U.S. at 345 (emphasis added). But more commonly, those who may be classed as public figures "have thrust themselves to the forefront of *particular public controversies* in order to influence the resolution of the issues involved," and they are public figures *for only those limited purposes. Id.* (emphasis added). As the Court summarized:

> [The] designation [that one is a public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure *for all purposes and in all contexts.* More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure *for a limited range of issues.*

Id. at 351 (emphasis added); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979); *Wolston v.*

Reader's Digest Ass'n., Inc., 443 U.S. 157, 164-68 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976). Accordingly, we have stated that a public figure may be either (1) an "all-purpose public figure[ ]," who achieves "such pervasive fame or notoriety" that he becomes a public figure "for all purposes and in all contexts" or (2) a "limited-purpose public figure[ ]," who voluntarily injects himself "into a particular public controversy" and thereby becomes a public figure "for a limited range of issues." *Foretich*, 37 F.3d at 1551-52; *see also Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir. 1999).[3]

Accordingly, in contrast to a public official or an all-purpose public figure, either of whom must always meet the actual malice standard, a "limited-purpose public figure," one who has "thrust [himself] to the forefront of *particular public controversies* in order to influence the resolution of the issues involved," *Gertz*, 418 U.S. at 345 (emphasis added), must show actual malice only when alleging defamation with regard to the particular controversy into which he has inserted himself.

The reasons for narrowing the protections of state defamation law for limited-purpose public figures give rise to factors that we have articulated for determining whether a plaintiff in a defamation case is a private person entitled to the full protection of

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[3] *Gertz* and *Foretich* also suggested that an additional type of public figure might be an "involuntary" public figure, one who obtains public figure status "through no purposeful action of his own." *Gertz*, 418 U.S. at 345; *Foretich*, 37 F.3d at 1551. But, as *Gertz* observed, the instances of classifying a person as an involuntary public figure would be "exceedingly rare." *Gertz*, 418 U.S. at 345.

state defamation law or a limited-purpose public figure entitled to only a narrowed protection. Under these factors, we focus on whether:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.

Foretich, 37 F.3d at 1553; *see also Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708-11 (4th Cir. 1991) (en banc); *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982).

B

We now assess whether Dr. Hatfill was indeed a limited-purpose public figure, as the district court concluded.[4]

The record shows the following about Dr. Hatfill. After he graduated from medical school in Rhodesia

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[4] In addition to finding Dr. Hatfill to be a limited-purpose public figure, the district court held that he could alternatively qualify as both a public official and an involuntary public figure. We do not review these conclusions, however, as we rest our holding only on our finding that Dr. Hatfill was a limited-purpose public figure.

(now Zimbabwe) and obtained a Master's degree in pathology in South Africa, he practiced medicine in South Africa. From South Africa, he returned to the United States where, in 1996, he received a research fellowship from the National Institutes of Health ("NIH") to study infectious diseases. At the NIH he became a respected figure within the U.S. bioterrorism community, giving public lectures and becoming involved in preparedness training for bioterrorist attacks.

At the conclusion of his NIH fellowship, Dr. Hatfill obtained a fellowship from the National Research Council, a private organization, to study infectious diseases, particularly the Ebola virus, at the U.S. Army Medical Research Institute for Infectious Diseases at Ft. Detrick, Maryland. While at Ft. Detrick, Dr. Hatfill was given security clearance to work with Biosafety Level 3 pathogens, which include anthrax, plague, and monkeypox, and was vaccinated against anthrax. He was one of about 100 persons who had access to "wet" anthrax spores, which were kept in an unlocked closet at the site, but his official work at Ft. Detrick did not include working with anthrax.

During the course of his work at Ft. Detrick, Dr. Hatfill provided briefings to government officials and taught the military, intelligence, and law enforcement communities about biological weapons and preparedness for bioterrorist attacks. He was an instructor for both the CIA's Chemical and Biological Weapons Proliferation Course and the Defense Intelligence Agency's Joint Military Attache School. He briefed officials at the CIA, the Office of the Secretary of Defense, and the State Department

about bioterrorism, and spoke about it at a conference sponsored by the Army War College. He also briefed, among others, the FBI's Joint Terrorism Task Force, the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict, and the National Security Council. In this vein, he wrote a paper describing how the military could address bioterrorism, which he gave to the Commander at Ft. Detrick and the Special Operations/Low Intensity Conflict Officer at the Pentagon.

Dr. Hatfill also gave public speeches during this same period. For example, he gave a lecture at the Council on Foreign Relations on biological terrorism and made a presentation attended by the press on "Emerging Threats of Biological Terrorism." He also attended the Department of Defense's Worldwide Conference on Antiterrorism where, alongside other prominent bioterrorism experts, he spoke about biological weapons.

While at the NIH and Ft. Detrick, Dr. Hatfill acknowledged that "[t]he more I learned about biological warfare, the more alarmed I became about this potential threat," particularly in the context of "[s]everal anthrax hoaxes [that] had by then been described in the media." Accordingly, during this time, he increased his efforts to publicize the threat from bioterrorism and became known in the scientific community for his warnings that the United States was unprepared for an attack. Colleagues described him as "a strong believer that there was a need to prepare against bioterrorism," and noted that "he was a kind of whistle blower of sorts in government on the issue."

When his fellowship for work at Ft. Detrick ended in January 1999, Dr. Hatfill took a job as Director of Biological Security Programs with Science Applications International Corporation ("SAIC"), another private company, but one receiving nearly 90% of its revenue from government-contracted work. While at SAIC, Dr..Hatfill developed a special biological warfare defense curriculum for the State Department; he upgraded course materials for the CIA; and he served as an expert or consultant on various government projects. He designed and gave classified lectures on biological weapons production to the CIA, the Defense Intelligence Agency, and Special Operations units of the armed forces. He also attended a classified lecture which described the process for producing powdered anthrax and on at least one occasion delivered a lecture himself on weaponizing anthrax.

After the September 11, 2001 attacks on the World Trade Center and the Pentagon, Dr. Hatfill led the SAIC team preparing recommendations for securing U.S. ports and harbors against biological threats, and went to work on other security-related government contracts. His supervisors at SAIC described him as "a national subject matter expert, whose opinions and technical advice [were] widely sought" in the area of bioterrorism, and noted that Dr. Hatfill had "an extensive network of contacts within the Department of Defense, the special operations community, and the Central Intelligence Agency."

In addition to the reputation he developed in carrying out his jobs, Dr. Hatfill spread his message through the media. In September 1999, Dr. Hatfill

co-authored an article in the journal *Surgical Services Management* entitled "Answering the Chemical and Biological Warfare Threat," which urged the public health community to step up efforts to prepare for a chemical or biological attack. And in 2001, he submitted an article to his college alumni magazine, describing his career and identifying himself as "a specialist in biological warfare and its defense." The article included a photograph of him in a biosafety suit. He also wrote or called the media to volunteer his message on bioterrorism. For instance, following an anthrax scare at the B'nai B'rith headquarters in Washington, D.C., he called Armstrong Williams, a syndicated columnist, to offer "thoughts . . . on it." In April 1997, following a seminar on "Super Terrorism," he wrote a panelist, "I am tremendously interested in becoming more involved in this area and would like to volunteer my background, expertise and time, for whatever use these might be to the Terrorism Studies Program." Dr. Hatfill succeeded in appearing in news publications, magazines, books, and on television and radio programs on numerous occasions. He posed for a picture demonstrating how a determined terrorist could create biological weapons by "cooking up" plague in his own kitchen. The picture appeared in *Insight* magazine, and a commentary on the demonstration also appeared in *Quebec Science* magazine, in an editorial questioning Canada's preparedness for bioterrorist attacks. In addition, *Insight* magazine printed an article discussing the possibility of an anthrax attack at an airport, which included an interview with Dr. Hatfill, referring to him as a specialist in bioterrorism management. In 1996, Dr. Hatfill appeared on "Capital Ideas" with

Rob Armstrong, a CBS News Radio program, to discuss topics related to his research, and in August 1999, he provided an interview to *The Washington Times* on the subject of bioterrorism and the threat of weaponized anthrax, noting that, in his opinion, the United States was unprepared for such an attack.

Following the anthrax attacks in the fall of 2001, Dr. Hatfill continued to appear publicly in the discussion of bioterrorism and the anthrax attacks. On October 1, 2001, four days before the first anthrax victim died, *The Washington Times* republished a 1997 article on bioterrorism featuring Dr. Hatfill, which included his observations about the release of anthrax in public buildings. He told ABC News that it was difficult to make anthrax and stressed that he thought the attacks were probably the work of international terrorists, even though he had earlier told a colleague that he could make dry powdered anthrax like that used in the attacks without access to a lab "because I know what I'm doing." During this period Dr. Hatfill sent a letter to three doctors discussing the characteristics of the mailed anthrax and describing his expertise regarding the use of anthrax as a biological weapon. And in February 2001, he was interviewed by a journalist with *The Baltimore Sun*, which quoted him (although not by name) as saying that although he was one of "a bunch of people on [an FBI] list" of suspects based on a "profile" of the suspected anthrax mailer, he was "one of the good guys."

Apart from his voluntary efforts, the FBI investigation into the anthrax attacks drew wide attention to Dr. Hatfill. An FBI search of Dr. Hatfill's

apartment was televised live and attracted extensive media coverage, and after Dr. Hatfill's home was searched, news agencies began printing stories about him. Dr. Hatfill characterized the press coverage that followed the search as a "media frenzy."

As the investigation continued, so did the media coverage increase. A friend described Dr. Hatfill to Wolf Blitzer in an interview on CNN as "kind of a whistle blower of sorts in government on the issue [of bioterrorism]. A lot of people didn't like what he was saying because it was uncomfortable, but he was trying to focus attention on the issue in a positive and constructive way." *Newsweek* magazine reported that bloodhounds exposed to scent packets preserved from the anthrax envelopes had reacted strongly to Dr. Hatfill's home, his girlfriend's home, his ex-girlfriend's home, and restaurants he had recently visited. During this time, Dr. Hatfill also had numerous voluntary meetings and contacts with reporters. He had dinner with Judith Miller of *The New York Times*, lunch with Tom Connolly and Ted Koppel of ABC News, and lunch with Jim Stewart and Mark Katov of CBS News. He also made formal public statements on the case and attended meetings with other journalists from *The Washington Post*, National Public Radio, *The Los Angeles Times*, NBC News, United Press International, and *The Washington Times*.

During these same months following the anthrax attacks, several media outlets (other than *The New York Times*) identified Dr. Hatfill by name as a prime suspect in the anthrax attacks. Only after other media so identified him did Kristof refer to him by name in his columns.

C

To determine whether Dr. Hatfill "thrust [himself] to the forefront" of the relevant controversy "to influence the resolution of the issues involved," *see Gertz*, 418 U.S. at 345 (defining a limited-purpose public figure), we now turn to the five factors we identified for making the limited-purpose-public-figure determination, *see Foretich*, 37 F.3d at 1553.

First, on whether Dr. Hatfill had "access to channels of effective communication," it becomes readily apparent from the record that Dr. Hatfill was viewed as an expert on the topics of bioterrorism and biological weapons, including anthrax, and that he could command attention in this field. He was a frequent instructor of government agencies and personnel, had frequent meetings with journalists on the subject, and appeared on television, radio, and in print, both before and after the anthrax attacks occurred. Indeed, he was able, through two press conferences he convened, to refute "facts" written about him and to deny his involvement in the anthrax attacks. His access to channels of communication substantially exceeded those that we held sufficient in *Reuber*. In *Reuber*, we found that the plaintiff had testified before Congress and the Environmental Protection Agency; had given lectures on subjects related to the allegedly defamatory articles in which he was mentioned; had provided interviews to a newspaper; and had published several relevant scientific papers. *Reuber*, 925 F.2d at 708-09. If Reuber's access to channels of communication was sufficient, so too is Dr. Hatfill's.

The second and third factors -- which, in *Reuber*, 925 F.2d at 709, we combined to inquire "'whether

the plaintiff [had] voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy"' -- represent the "heart of our five-factor test," *Carr*, 259 F.3d at 280 (quoting *Reuber*, 925 F.2d at 709). To determine whether these combined factors are satisfied, we first address the nature of the "particular public controversy" that gave rise to the alleged defamation to determine whether Dr. Hatfill thrust himself into *that* controversy. *See Gertz*, 418 U.S. at 345; *Foretich*, 37 F.3d at 1553-54.

Dr. Hatfill argues that we should interpret the words "particular public controversy" narrowly and therefore that the relevant public controversy is "who committed the anthrax attacks in 2001." With this limited definition of public controversy, he argues that he did not "voluntarily assume a role of special prominence," even if he had previously been vocal about bioterrorism. The New York Times, by contrast, argues that we have previously interpreted "particular public controversy" more broadly, explaining that the "use of the word 'particular' signifies only that a court must identify the specific or 'particular' controversy or controversies fairly addressed by the publication at issue before determining whether the plaintiff had voluntarily participated in the controversy so identified." The New York Times believes the particular public controversy in this case to be the debate on the threat from bioterrorism and the nation's lack of preparation for it, rather than the relatively narrow example of that threat exemplified by the specific anthrax mailings in 2001.

We agree with the view suggested by The New York Times. In light of the purpose of the public figure doctrine to encourage robust and uninhibited commentary on public issues, it stands to reason that we should look to the scope of the message conveyed in *The New York Times* through the articles that Dr. Hatfill is challenging. A fair reading of Kristof's columns reveals a debate about national security, the nation's lack of preparedness for bioterrorism, and the example provided by the FBI's investigation of the anthrax attacks in light of the evidence appearing against Dr. Hatfill. And, as Kristof stated in one of the early columns, the FBI's "lackadaisical attitude in pursuing the anthrax killer continues *to threaten America's national security.*" (Emphasis added). As the FBI investigation continued to show FBI lethargy, Kristof said in a later column that "there are two larger issues." He pointed first to the FBI's slowness in carrying out the investigation and second to "the need for much greater care within the U.S. biodefense program." Finally, focusing on Dr. Hatfill as a recognized expert as well as a potential suspect, Kristof quoted Dr. Hatfill's response to an *earlier* anthrax scare in Washington, D.C., when Dr. Hatfill had stated, "As was evidenced in downtown Washington, D.C., a few hours later [after the false anthrax letters were received at the B'nai B'rith headquarters], this topic [bioterrorism] is vital to the security of the United States. I am tremendously interested in becoming more involved in this area." Kristof observed that Dr. Hatfill used the earlier incident "to underscore the importance of his field and his own status within it."

Thus, while focusing on solving the anthrax mailings of 2001, which prompted the larger debate,

Kristof was, above all, concerned about the government's efforts to protect the nation from a bioterrorist attack.

The discussion of a particularized threat within the context of a larger debate in this case is strikingly similar to the circumstances defining the "particular controversy" in *Fitzgerald v. Penthouse International, Ltd.* ("*Fitzgerald II*"), 691 F.2d 666 (4th Cir. 1982), which concerned the plaintiff's defamation action arising out of publication of an article on the military use of dolphins. Fitzgerald, the plaintiff and a self-proclaimed expert on the use of dolphins for military purposes, alleged that an article in *Penthouse* magazine was defamatory when it suggested that he may have disclosed "top secret" information related to the military use of dolphins to other countries. *Fitzgerald v. Penthouse Int'l, Ltd.* ("*Fitzgerald I*"), 639 F.2d 1076, 1079 (4th Cir. 1981). In *Fitzgerald II*, we held that, although the allegedly defamatory statements were the suggestions that Fitzgerald had disclosed secret information and that he had been involved in espionage by offering to sell dolphin torpedoes to other countries, the "particular public controversy" within which to analyze his status as a public figure was the larger controversy surrounding the military's use of dolphins, not the specific and narrow question of *who had leaked the information*. *See Fitzgerald II*, 691 F.2d at 668-69. Indeed, the situation in *Fitzgerald* -- where an expert in a field claims defamation when a news publication later suggests he might have committed a crime relevant to that field -- is almost identical to the circumstance in this case. Thus, just as we identified the particular public controversy in *Fitzgerald II*, we conclude in this case that the particular public

controversy is the threat from bioterrorism and the nation's preparedness to handle that threat, with the anthrax attacks as the specific example that opened the debate to greater discussion.

It follows from the nature of the particular controversy that Dr. Hatfill "voluntarily assumed a role of special prominence" in the controversy. And he did so in an attempt "to influence the resolution of the controversy." *Reuber*, 925 F.2d at 709. Throughout his career, Dr. Hatfill was not only repeatedly sought out as an expert on bioterrorism, but was also a vocal critic of the government's unpreparedness for a bioterrorist attack, as evidenced by the topics of his lectures, writings, participation on panels, and interviews. Through these media, Dr. Hatfill voluntarily thrust himself into the debate. He cannot remove himself now to assume a favorable litigation posture.

The last two factors are also indisputably satisfied in this case. The particular public controversy surely existed prior to the publication of the allegedly defamatory statements. The controversy over the nation's preparedness for bioterrorist attack existed years before *The New York Times* published Kristof's columns, and it was this very topic on which Dr. Hatfill centered his entire career. In addition, the controversy heightened with the investigation into the anthrax attacks themselves, which began in the fall of 2001, more than six months before Kristof's columns appeared, and Dr. Hatfill himself used the attacks as a platform from which to intensify his message about national unpreparedness, thus satisfying the final requirement -- that he "retained public-figure status

at the time of the alleged defamation." *Foretich*, 37 F.3d at 1553.

We therefore conclude that Dr. Hatfill meets the criteria for classification as a public figure for the limited purpose of the controversy regarding the bioterrorism threat and the nation's preparedness for a bioterrorist attack, with the anthrax attacks as but an example of that controversy.

III

As a limited-purpose public figure, Dr. Hatfill had to show, in order to prevail on his defamation claim, that The New York Times acted with actual malice in publishing the challenged columns, meaning that the alleged defamatory statements had to be made with knowledge that they were false or with reckless disregard of their falsity, *i.e.*, with a "high degree of awareness of [their] probable falsity." *Reuber*, 925 F.2d at 714 (quoting *Garrison*, 379 U.S. at 74). Moreover, he had to "forecast evidence sufficient to prove actual malice by *clear and convincing* evidence." *Carr*, 259 F.3d at 282 (emphasis added). Dr. Hatfill did not make that showing.

In both counts for defamation, Dr. Hatfill asserted that Kristof's columns, as well as isolated statements within them, conveyed a specific defamatory meaning -- the strong suggestion that Dr. Hatfill was the anthrax mailer and therefore that he was a terrorist who committed murder. Therefore, to show actual malice Dr. Hatfill had to show by clear and convincing evidence that Kristof either knew of the falsity of this suggestion, i.e., he knew Dr. Hatfill did not commit the anthrax mailings, or that Kristof had a "high degree of awareness" of its

probable falsity, again that Dr. Hatfill did not commit the anthrax mailings. From our careful review of the record, we conclude that Dr. Hatfill did not satisfy this burden.

Indeed, the record contains substantial evidence to support The New York Times' contention that Kristof *actually believed* that Dr. Hatfill was the prime suspect. At the time that Kristof wrote his columns, he knew from several sources that Dr. Hatfill fit the profile that the FBI had developed and that he had been identified specifically by the FBI as a suspect who should be investigated carefully. In conducting research for his columns, Kristof had reviewed many previously published articles about Dr. Hatfill, which recounted that he had been questioned by the FBI more than once; that he had voluntarily vaccinated himself against anthrax shortly before the mailings; that he had access to labs where anthrax was stored; that he had knowledge about anthrax's use as a weapon; that he had strong views about the bioterrorism threat; that he had agreed that his "background naturally drew the FBI's attention"; that he had spoken frequently about possible bioterrorism; and that he lost his security clearance after he failed a polygraph test shortly before the mailings. In addition, Kristof reviewed numerous documents, including Dr. Hatfill's resume and various reports, papers, and letters written by him describing his knowledge of bioterrorism and biological weapons.

With these undisputed facts, no reasonable jury could find that Kristof had a "high degree of awareness" that Dr. Hatfill was *not* the anthrax mailer. *Garrison*, 379 U.S. at 74. As the district court

found, the evidence in this case "*at best*" reveals that Kristof "did not know whether or not [Dr. Hatfill] was the anthrax mailer, but did believe that [Dr. Hatfill] was someone that [the] FBI should investigate more thoroughly." (Emphasis added).

Dr. Hatfill contends that because Kristof was warned that one of his main sources, Dr. Barbara Rosenberg, was untrustworthy, and yet still published his columns, we should find actual malice. But Dr. Rosenberg was considered an expert in the field of biological weapons and had been called upon by the FBI to discuss the anthrax investigation. Given Dr. Rosenberg's background, there is no reason that Kristof's reliance on her statements constitutes actual malice, even given the expressed disagreement of others with regard to her opinions. Constitutional malice requires "much more than a failure to exercise ordinary care" -- it demands evidence of the "publication of a *completely* fabricated story, or of one based entirely on an unverified anonymous telephone call; or publication where there are obvious reasons to doubt the veracity of the informant." *Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980) (emphasis added) (citing *St. Amant*, 390 U.S. at 732). Such was not the case here. We agree with the district court's conclusion that "based on all the information he had gathered, Mr. Kristof had no reason to seriously doubt that [Dr. Hatfill] could have been the anthrax mailer."

The allegations in Count II, listing discrete statements alleged to be false, do not improve Dr. Hatfill's arguments, because at bottom, Dr. Hatfill still maintains that the discrete false statements in the columns constituted defamation because they

"*tend[ed] to incriminate Dr. Hatfill in the anthrax mailings.*" (Emphasis added). This is the same defamatory message allegedly conveyed by the columns as a whole, as alleged in Count I.

Accordingly, we affirm the district court's judgments on Counts I and II.

IV

Dr. Hatfill also contends that the district court erred in granting summary judgment on his claim for intentional infliction of emotional distress.

Under Virginia law, to recover for intentional infliction of emotional distress, Dr. Hatfill had to prove that (1) "the wrongdoer's conduct was intentional or reckless"; (2) "the conduct was outrageous and intolerable"; (3) "there was a causal connection between the wrongdoer's conduct and the emotional distress"; and (4) "the emotional distress was severe." *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974). When we had this case on the first appeal and reinstated Dr. Hatfill's claim for intentional infliction of emotional distress, we recognized that "if Dr. Hatfill "ultimately [could not] prevail on his defamation claims because he [was] unable to satisfy [the] constitutional requirements for recovery, then he likely [would] be unable to prove that The Times' misconduct was intentional or reckless or that such misconduct was sufficiently outrageous to warrant recovery" for intentional infliction of emotional distress. *Hatfill*, 416 F.3d at 336-37.

On remand, the district court concluded that because Dr. Hatfill "failed to satisfy his burden of showing" that The New York Times "act[ed] with

malice when it published Kristof's columns," he also had failed to produce enough evidence to be able to convince a reasonable jury that The New York Times had either "intentionally or recklessly caused him severe emotional distress" or that its conduct was otherwise "sufficiently outrageous" to support liability for intentional infliction of emotional distress. We agree and affirm the district court's conclusion.

V

Finally, as an overarching claim, Dr. Hatfill contends that the district court erred in granting summary judgment to The New York Times in light of The Times' refusal to comply with the district court's order that it disclose its sources. We find the argument unpersuasive.

Dr. Hatfill's argument is based on a non sequitur. Simply because The New York Times refused to comply with the district court's order that it disclose its sources does not mean that The Times was precluded an award of summary judgment. The district court, in its discretion, sanctioned The Times for refusing to comply with the order, precluding it from referring to, relying on, or entering into evidence the existence of the two confidential sources that were not disclosed or the information they provided to Kristof. Dr. Hatfill does not suggest that The New York Times' motion for summary judgment violated that sanction.

Thus, Dr. Hatfill can only be challenging the adequacy of the sanction itself. But the district court exercised its discretion to impose a penalty that would "ameliorate [the] prejudice" to Dr. Hatfill

"without resorting to overly drastic measures given the nature of this case," and therefore restricted The Times' ability to refer to the sources for evidence. We conclude that the sanction imposed by the district court did not amount to an abuse of discretion, and therefore we reject Dr. Hatfill's argument. *See Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003) (noting standard of review).

The judgment of the district court is accordingly

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN J. HATFILL, Plaintiff-Appellant
v.
THE NEW YORK TIMES COMPANY, Defendant-Appellee, and NICHOLAS KRISTOF, Defendant.

No. 07-1124

August 11, 2008, Filed

AMERICAN BROADCASTING COMPANIES, INCORPORATED; ALM MEDIA, INCORPORATED; THE ASSOCIATED PRESS; BLOOMBERG L.P.; CBS BROADCASTING, INCORPORATED; COX ENTERPRISES, INCORPORATED; DOW JONES & COMPANY, INCORPORATED; GANNETT COMPANY, INCORPORATED; HEARST CORPORATION; LANDMARK COMMUNICATIONS, INCORPORATED; AGAZINE PUBLISHERS OF AMERICA, INCORPORATED; NBC UNIVERSAL, INCORPORATED; NEWSPAPER ASSOCIATION OF AMERICA; NEWSWEEK, INCORPORATED; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; TIME,

INCORPORATED; THE WASHINGTON POST COMPANY

Amici Supporting Appellee

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

STEVEN J. HATFILL, Plaintiff

v.

THE NEW YORK TIMES COMPANY, Defendant.

Civil Action No. 04-0807

January 30, 2007, Decided
January 30, 2007, Filed

Before: Claude M. HILTON, United States District Judge.

Claude M. HILTON, United States District Judge.

MEMORANDUM OPINION

This matter comes before the Court on Defendant's Motion for Summary Judgment. Plaintiff filed a three-count Complaint in this Court asserting causes of action for defamation and intentional infliction of emotional distress in connection with a series of columns authored by Nicholas Kristof that appeared on the Op-Ed pages of The New York Times. Count One for defamation alleges that the columns written by Nicholas Kristof and published by the New York Times falsely

implicate Plaintiff in the 2001 anthrax mailings that killed at least five individuals. Count Two, also for defamation. alleges that eleven discrete allegations within the columns tend to incriminate Plaintiff in the anthrax mailings. Count Three alleges intentional infliction of emotional distress on the ground that the public identification and implication of Plaintiff with the anthrax deaths was "unconscionable, malicious, intentional, and calculated to inflict grievous emotional distress on [Plaintiff]."

Plaintiff commenced this action on June 13, 2004. Defendant moved to dismiss all counts, and this Court granted dismissal on the ground that Plaintiff failed to state a claim upon which relief could be granted. On July 28, 2005, the Fourth Circuit reversed in substantial part this Court's decision, holding that Plaintiff had adequately pled the elements of all of his claims. Defendant's petition for a rehearing and rehearing *en banc* was denied, as was Defendant's petition to the United State Supreme Court for a writ of certiorari. The parties have now completed extensive discovery and the matter is again before this Court on Defendant's Motion for Summary Judgment.

The columns at issue, published during the summer of 2002, recount the failures of the Federal Bureau of Investigation (FBI) in its investigation of the anthrax mailings that occurred in the fall of 2001. In these columns, Mr. Kristof highlights specific mistakes made in the FBI's investigation. As an example of the FBI's shortcomings in the anthrax investigation, the columns focus in large part on the

FBI's failure to adequately investigate Plaintiff, Steven Hatfill.

Prior to the publication of Mr. Kristof's columns, Plaintiff established a reputation in the field of infectious disease and bioterrorism research. In 1996, the National Institutes of Health (NIH) awarded plaintiff a fellowship to work on a NASA program relating to human-tissue research and infectious disease. The next year, Plaintiff received a fellowship that authorized him to work at the United States Army Medical Research Institute for infectious diseases (USAMRIID). Plaintiff began work there in the fall of 1997 and remained there until 1999. While at USAMRIID, Plaintiff had security clearance to work with Biosafety Level 3 pathogens, including anthrax, plague, and monkeypox. Throughout his tenure at USAMRIID, Plaintiff provided briefings to government officials and to various military, intelligence, and law-enforcement agencies within the federal government on issues of biological weapons and the country's preparedness for an attack.

Dating as far back as 1996, Plaintiff took it upon himself to publicize the threat posed to the United States from biological weapons. While at NIH, Plaintiff posed for a picture demonstrating how a determined terrorist could create a biological weapon, such as the plague, in his own kitchen. Plaintiff's participation in this demonstration was noticed by *Quebec Science* magazine, and led an editor to question Canada's preparedness for a bioterrorist attack. In August 1997, Plaintiff provided an interview to a *Washington Times* columnist on the subject of bioterrorism, and

specifically the threat of anthrax being used as a weapon. During this interview, Plaintiff noted that the United States' health care system was ill prepared for such an attack.

In January 1998, Plaintiff provided an interview to *Insight* magazine about the risks of a biological attack and how an anthrax attack could be orchestrated. Also that year, Plaintiff offered his thoughts and expertise on nationally syndicated radio and television shows and discussed bioterrorism and the need for increased government vigilance. Plaintiff also drafted a novel, which he registered with United States Copyright office, describing a scenario in which a terrorist sickens government officials with a biological agent. The novel was never published.

Members of the scientific community within Plaintiff's area of expertise viewed Plaintiff as an expert in his field, and drew upon his expertise on several occasions. His co-workers and colleagues believed that he was very knowledgeable in the area of biological weapons and agents. While working at USAMRIID, Plaintiff gave an interview about his own background to Richard Preston for inclusion in his book, *The Hot Zone*. In 1998, Plaintiff sat on a panel alongside two of the country's leading experts in the production of dry anthrax addressing the subject of biological weapons. Plaintiff also held himself out as having a working knowledge of wet and dry biological weapons.

In January 1999, Plaintiff took a position with Science Applications International Corporation (SAIC), one of the nation's largest government contracting firms. At SAIC, Plaintiff served as a

lecturer for the State Department on the medical effects of chemical and biological agents. Plaintiff designed and gave classified lectures on biological weapon production to the CIA, the DIA, and special operations units of the armed forces. In addition, Plaintiff attended a classified lecture which described the process for producing powdered anthrax, and on at least one occasion, delivered a lecture on weaponizing anthrax. In September 1999, Plaintiff co-authored an article in the journal *Surgical Services Management* entitled "Answering the Chemical and Biological Warfare Threat," which urged the public health community to step up efforts prepare for a chemical or biological attack. Pursuant to a SAIC contract with the Joint Special Operations Command at Fort Bragg, Plaintiff supervised the creation of a simulated biological weapons laboratory inside an shipping container and trained forces how to recognize and destroy such containers. Government officials sought Plaintiff's advice on matters of national security and bioterrorism, and considered him an expert in biological weaponry.

In August of 2001, three weeks before the anthrax mailings, the Defense Security Service suspended Plaintiff's security clearance. As a result of this suspension, SAIC terminated Plaintiff in March of 2002. After leaving SAIC, Plaintiff took a position with Louisiana State University to work on a federally-funded program, a program which Plaintiff described as being one of national importance. The program dealt with biological weaponry and training of federal and state governments in the proper response to a bio-terror event.

In the fall of 2001, an unknown individual sent letters laced with anthrax to several news organizations and members of Congress. Following these attacks, Plaintiff spoke with a reporter for ABC News offering his opinion that the anthrax attacks were probably not of domestic origin. He also sent a letter to three doctors discussing the characteristics of the mailed anthrax and touting his expertise on anthrax as a biological weapon.

During the first few weeks of its investigation, the FBI identified Plaintiff as a person of interest. The FBI interviewed Plaintiff and conducted at least one polygraph examination. The FBI also conferred with Dr. Barbara Hatch Rosenberg, a Ph.D. molecular biologist at the State University of New York, meeting with her on several occasions to discuss the investigation and her profile of the anthrax mailer.

By early 2002, the media began to focus on Plaintiff, but did not identify him by name. In June 2002, the FBI searched Plaintiff's apartment. This search generated a significant amount of news coverage. The FBI also searched Plaintiff's car and a condominium owned by Plaintiff's girlfriend. The FBI seized several items in these searches, including notes regarding the anthrax mailings, a spinner flask of anthrax stimulant, and a container of Cipro.

In August 2002, LSU placed Plaintiff on administrative leave after the United States Department of Justice directed the University to cease using Plaintiff as an instructor and terminate government funding of his programs. That same month, Attorney General John Ashcroft identified Plaintiff on national television as a "person of

interest" in the anthrax investigation. Soon after, Plaintiff held press conferences to refute allegations that he was in any way involved with the attacks. On August 26, 2003, Plaintiff filed a lawsuit against Attorney General Ashcroft, the DOJ, the FBI and others, charging them with accusing Plaintiff without formally naming him as a suspect or charging him with any wrongdoing.

Nicholas Kristof is an Op-Ed columnist for Defendant, the New York Times. Beginning in the fall of 2001, Mr. Kristof undertook to stir public debate over national security and specifically, opined on how the anthrax investigation was proceeding. From January through August of 2002, Mr. Kristof wrote a series of six Op-Ed columns on the subject. Mr. Kristof's columns expressed his views that the FBI was not pursuing the investigation in an acceptable manner. He pointed out that the FBI's failure to investigate Plaintiff fully was an example of the Bureau's inadequacies. In each column, Mr. Kristof stressed Plaintiff's denial of wrongdoing, reported that Plaintiff's friends viewed him as a patriot, and urged the FBI to investigate Plaintiff more aggressively or exculpate him altogether.

All but the last column, which identified Plaintiff by name, referred to Plaintiff by the pseudonym "Mr. Z." Mr. Kristof identified Plaintiff by name only after Plaintiff had appeared in a press conference refuting allegations of his involvement in the anthrax mailings. Mr. Kristof contends that he used the pseudonym "Mr. Z" so as not to direct unwarranted attention to Plaintiff. In gathering information for his columns, Mr. Kristof researched a variety of news reports about Plaintiff and the investigation,

reviewed documents related to Plaintiff, and consulted with prominent scientists and friends and colleagues of Plaintiff.

The case before this Court centers on the aforementioned facts. Defendant now asks this Court to grant summary judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In reviewing a motion for summary judgment, courts view the facts in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party then has the burden of showing that a genuine dispute as to any material fact does exist. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The mere' existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson*, 477 U.S. at 248. "Rule 56(e) requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

In a defamation case, a plaintiff's burden of proof depends on the classification of the plaintiff as either a private figure, or a public figure or public official.

To recover compensatory damages for defamation, a public official or public figure must show actual malice while a private figure may recover with a lesser showing of culpability. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1973); *see also Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1990). When the matter involved is a matter of public concern, either type of plaintiff must show malice by clear and convincing evidence. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Therefore, this Court must first determine Plaintiff's status as a public or private figure.[1] A defamation plaintiff is a "public official" where his "position in government has such apparent importance that the public has an independent interest in qualifications and performance of the person who holds it." *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966). Such interest must go beyond the "general public interest in the qualifications and performance of all government employees." *Id.* A defamation plaintiff that receives this designation receives less protection under defamation law because the interests in public discussion are particularly strong and outweigh society's interest in preventing attacks on reputation. *Id.* at 86.

In applying this standard, a court must consider whether the individual's position is "one which would

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[1] Whether a defamation plaintiff is a public official or public figure is an issue of law to be resolved by the court. *See Wells v. Liddy*, 186 F.3d 505, 531 (4th Cir. 1999). A court making this determination must "look through the eyes of a reasonable person at the facts taken as a whole." *Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1551 (4th Cir. 1994) (citation omitted).

invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. *Id.* at 86 n.13. For a plaintiff to be deemed a public official, he need not hold a formal government position. Rather, a plaintiff may be deemed a public official when he has, or appears to the public to have "substantial responsibility for or control over the government affairs." *Baumback v. American Broadcasting Co.*, No. 97-2316, 1998 U.S. App. LEXIS 18770, at *13-14 (4th Cir. Aug. 13, 1998) (noting that according to the plaintiff's curriculum vitae, the plaintiff "maintained the appearance that he wielded substantial control"). Thus, the designation of "public official" turns on whether the plaintiff had "substantial responsibility - actual or apparent - for administration of governmental matters." *Id.* at *8. In making this determination, courts examine whether the plaintiff "made [] recommendations, participated in [] policy determinations, and exercised [] discretion." *Id.* (quoting *Arctic Co. v. Loudoun Times Mirror*, 624 F.2d 518, 521-22 (4th Cir. 1980)).

In this case, Plaintiff qualifies as a public official both in fact and in appearance. Plaintiff left his formal government position when he went to work at SAIC. Nevertheless, he continued to perform governmental functions as a contractor with the government, sharing his expertise in the field of biological warfare, and as a participant at LSU in a government-funded program dealing with biological weaponry and training of other government officials and special forces. In the course of his work, Plaintiff regularly made recommendations to highly-ranked government officials with respect to biological

weaponry. Plaintiff also exercised discretion in developing training programs and protocols for the CIA, the DIA, the State Department, and certain elite branches of the armed services. At the time Mr. Kristof's columns appeared in print, Plaintiff was receiving federal funds to work on national defense programs that he himself described as being of "national importance."

Based on the above facts, this Court finds that Plaintiff qualifies as a public official for purposes of this defamation action. Plaintiff's participation in government training and decisionmaking placed him in a position of public trust. The public had an independent interest in Plaintiff's qualifications and performance given the highly sensitive nature of his work and its importance to national defense. His responsibilities and close connection with the federal government rendered him a public official.

Even if Plaintiff were not worthy of "public official" status, the Court finds that Plaintiff qualifies as a "public figure." There are two types of public figures relevant to this matter: a "limited purpose" public figure and an "involuntary" public figure. *See Gertz*, 418 U.S. at 345, 351 (identifying three distinct categories of "public figures"). A limited purpose public figure is a person who has pursued a course of conduct that "invite[s] attention and comment" and has "access to the channels of effective communication." *Id.* at 345. The Fourth Circuit adopted a five-factor test for determining whether a plaintiff is a public figure: (1) whether the plaintiff had access to the channels of effective communication; (2) whether the plaintiff voluntarily assumed a role of special prominence in a public

controversy by attempting to influence its outcome; (3) whether the plaintiff did in fact seek to influence the outcome; (4) whether the controversy existed prior to publication of the allegedly defamatory statements; and (5) whether the plaintiff retained public figure status at the time of the alleged defamation. *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (1982); *see also Reuber*, 925 F.2d 703; [*529] *Carr v. Forbes, Inc.*, 259 F.3d 273 (4th Cir. 2001).

In *Fitzgerald v. Penthouse Int'l, Ltd.*, the Court deemed the plaintiff a limited purpose public figure for purposes of a magazine article concerning the abuse of trained dolphins by the United States government. 691 F.2d at 668. Persuasive to the court was the fact that plaintiff had researched the military use of dolphin technology for the United States Navy, and had lectured and published several articles on the subject. *Id.* at 669. The Court also noted that the plaintiff had been interviewed on a television program and by a newspaper. The Court found there to be a pre-existing public controversy because the national press had covered the use of dolphins in Vietnam, and the subject had been addressed in the media. *Id.* The Court also found that the plaintiff had sought to influence the outcome of the controversy by lecturing and publishing on the topic. *Id.*

In *Reuber v. Food Chem. News, Inc.*, the Fourth Circuit accorded public figure status to a scientist who had performed research for the government on the pesticide, Malathion. 925 F.2d at 706-07. The plaintiff was the subject of an article about his involvement in a controversy surrounding the subject

matter of his research. The plaintiff was held to be a limited purpose public figure for purposes of an article on the health risks posed by Malathion. *Id.* The Court found that the plaintiff had significant access to channels of communication because he had testified before Congress and the Environmental Protection Agency, and had given lectures on the subject of health risks posed by the pesticide. *Id.* Additionally, the plaintiff had provided interviews to a newspaper, and had published several scientific papers on the subject. *Id.* His conduct, according to the Court, was sufficient to show that he had voluntarily assumed a role of special prominence in the controversy, and attempted to influence the controversy by challenging the government's conclusions regarding the controversy. *Id.* at 709-10.

Most recently, the Fourth Circuit announced in *Carr v. Forbes, Inc.*, that the "heart of the five-factor test is the second and third factors." 259 F.3d. at 280. Applying those factors, the Court found that "an engineer who develops privately funded public infrastructure projects" was a limited purpose public figure because his conduct when beyond simple government contracting. The plaintiff also invited public attention to himself and the contracts, making affirmative efforts to "engender public support" for specific public works projects, and seeking to achieve a level of "prominence in [his] professional field." *Id.* at 280-81 (citing *Reuber*, 925 F.2d at 709). *Id.*

Like the plaintiffs in *Fitzgerald*, *Reuber*, and *Carr*, Plaintiff satisfies the requirements for limited purpose public figure status. First, Plaintiff indeed had and still has access to numerous channels of communication, and in fact, had access to some of the

most well-known media outlets. For example, Plaintiff appeared as a guest-expert on CBS News Radio, and as recently as 2002, Plaintiff spoke with reporters for ABC News, *The New York Times*, and *The Baltimore Sun* about the investigation of the anthrax mailings. Plaintiff also published an article in a scientific journal on the threat of bioterrorism. Based upon these facts, it appears that Plaintiff had ready access to members of various news media.

As to the second and third factors, Plaintiff was a vocal critic of the government's level of preparedness for a bioterrorist attack. His lectures, writings, participation on panels, and interviews, as well as his own resume, led many to consider Plaintiff an expert in the field of biological weaponry. This is supported by testimony from those in the scientific community, as well as the fact of his retention by various government agencies. Based on this conduct, the Court can rightly conclude that Plaintiff voluntarily assumed a role of special prominence in the public debate over the nation's preparedness for a biological attack, and indeed sought to influence government policy.

Fourth, the controversy into which Plaintiff thrust himself can be properly defined as the government's handling of the bioterrorism threat, and more specifically, its handling of the anthrax investigation. All of the columns at issue expressly addressed the efficacy of the federal government's efforts to protect the nation from a bioterrorist attack. The controversy over the nation's preparedness for a bioterrorist attack existed years before the Times published Kristof's articles. The controversy over the FBI's handling of the anthrax

investigation began in the fall of 2001, also before the Times published any of the columns in question. Indeed, Plaintiff was publicly identified as a potential suspect by the press on several occasions before the first column at issue was ever published.

Finally, Plaintiff was a public figure at the time the allegedly defamatory columns were published. Plaintiff spoke with a reporter for ABC News on the subject of the anthrax mailings after the mailings occurred but before the Times published any of Mr. Kristof's columns.

Even if Plaintiff did not voluntarily inject himself into the public controversy surrounding bioterrorism, he still qualifies for public figure status. Even involuntary participants can be public figures when they choose a course of conduct which invites public attention. *See e.g.*, *Reuber*, 925 F.2d at 710. Plaintiff should have foreseen that by providing interviews, delivering lectures, and publishing articles on the subject of the bioterrorism threat, a public interest in him would arise. Because Plaintiff engaged in a course of conduct that was likely to invite attention and scrutiny, Plaintiff cannot now claim that he was a private figure who was dragged into this controversy unwillingly. This Court finds that Plaintiff is a public figure in the context of this particular controversy - the government's handling of the bioterrorism threat - covered by the columns at issue in this litigation.

As a public official and public figure, Plaintiff can only recover for defamation if he can show that Defendant acted with actual malice in publishing the columns at issue. *See Carr*, 259 F.3d at 282. Actual malice may be proven by showing that a defamatory

statement was made (1) with knowledge that it was false, or (2) with reckless disregard of its falsity, *i.e.*, a "high degree of awareness of its probable falsity." *Reuber*, 925 F.2d at 714 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). Actual malice must be established by clear and convincing evidence. *Carr*, 259 F.3d at 283.

The Fourth Circuit comprehensively addressed the actual malice standard in *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980), and provided examples of what kind of evidence will satisfy the standard. The Fourth Circuit acknowledged that actual malice requires "much more than a mere failure to exercise ordinary care in verifying statements." *Id.* at 731-32. For example, the Fourth Circuit explained that evidence such as "publication of a completely fabricated story, or of one based on an unverified anonymous telephone call, or publication where there are obvious reasons to doubt the veracity of the informant" could make the requisite showing. *Id.* at 732. However, if the sources of the fodder for the defamatory statements appeared reliable and defendant did not seriously doubt the veracity of accuracy of the information, the actual malice standard would not be satisfied. *Id.* at 734; *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (stating that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing" and "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication").

To avoid summary judgment, Plaintiff must "forecast evidence sufficient to prove actual malice by clear and convincing evidence." *Carr*, 259 F.3d at 282. In this case, Defendant is entitled to summary judgment because there is no evidence to establish that Mr. Kristof knew of the falsity of his statements, or that he harbored a "high degree of awareness" of the probable falsity of his statements. The evidence in the record demonstrates that Mr. Kristof did not believe that any of his statements were false. Moreover, by the time he wrote the columns at issue, Mr. Kristof was aware that Plaintiff had been identified as a person of interest in the investigation and that a number of media outlets had published facts raising suspicion about Plaintiff's possible connection to the mailings. Mr. Kristof also knew that several profiles of the anthrax killer generated by the FBI and others in the scientific community matched Plaintiff closely. Mr. Kristof spoke with a number of scientific experts as well as Plaintiff's colleagues, many of whom agreed that Plaintiff ought to be investigated further. Moreover, Mr. Kristof personally reviewed hundreds of documents, including Plaintiff's own resume, that he believed confirmed Plaintiff's ability to make anthrax and Plaintiff's potential access to the type of anthrax used in the attacks.

Additionally, no evidence exists tending to show that Mr. Kristof had a high degree of awareness of the probable falsity of his columns. At best, the evidence reveals that, when Mr. Kristof published his columns, he did not know whether or not Plaintiff was the anthrax mailer, but did believe that Plaintiff was someone that FBI should investigate more thoroughly. Even if Mr. Kristof was not certain as to

the truth of the alleged implication of guilt, this would not be sufficient to support a finding that he was highly aware of its probable falsity.

Plaintiff contends that Mr. Kristof was warned that one of his main sources, Dr. Barbara Rosenberg, was not trustworthy. Plaintiff's attempt to paint Dr. Rosenberg as a conspiracy theorist with absolutely no credibility is contrary to the evidence on record. Dr. Rosenberg was considered an expert in the field of bioweaponry, and headed a working group for bioweapons for the Federation of American Scientists. She was called upon by the FBI to discuss the anthrax investigation, and briefed Senate members on the investigation. Given her background, Plaintiff has shown had no reason that Mr. Kristof should have doubted the veracity of Dr. Rosenberg as an informant, even if others expressed disagreement with her theories.

Based on all the information he had gathered, Mr. Kristof had no reason to seriously doubt that Plaintiff could have been the anthrax mailer. Therefore, Plaintiff cannot demonstrate that Defendant published the columns at issue with actual malice.

The second count of Plaintiff's complaint alleges that eleven "discrete false and reckless allegations" made in the columns constitute defamation because they tend to incriminate Plaintiff in the anthrax mailings. These allegations include the following: Plaintiff unquestionably had the ability to make first-rate anthrax; Plaintiff was one of several scientists who had "ability to access and motive to send anthrax"; Plaintiff had access to an "isolated residence" in the fall of 2001 and "gave Cipro to

people who visited" the residence; Plaintiff had anthrax vaccinations that were up to date; Plaintiff "failed 3 successive polygraph examinations"; Plaintiff was "upset with the United States Government for a period preceding the anthrax attack"; and Plaintiff had expertise in dry biological weapon agents.

In this Court's 2004 opinion dismissing this matter, this Court applied the reasoning adopted by the Second Circuit in *Herbert v. Lando*, 781 F.2d 298, 307-08, 312 (2d Cir. 1986), which held that a plaintiff's inability to carry his burden of proving defamation with respect to the implications of the publication as a whole precluded him from surviving summary judgment with respect to the specific statements when they imply the same defamatory meaning. *See Hatfill v. The New York Times Co.*, Civ. No. 1:04-807, 2004 U.S. Dist. LEXIS 27530 (Nov. 24, 2004). Under this "subsidiary meaning" doctrine, when a publication as a whole is not actionable for defamation, "other statements . . . should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert*, 781 F.2d at 312.

Applying the "subsidiary meaning doctrine," if the Court determines that Defendant is entitled to summary judgment with respect to the overall implication alleged in Count One, then there can be no recovery for the defamation alleged in Count Two because the defamatory implication of the discrete statements is not truly distinct from the larger thrust of the columns. In other words, the alleged defamatory impact of the columns in the aggregate is

no different from the defamatory implication allegedly conveyed by each of the individual statements.

Even if the discrete statements alleged in Count Two were independently actionable, Defendant is still entitled to summary judgment because Plaintiff has not come forth with evidence demonstrating that the statements are materially false. This showing of falsity is required of all defamation plaintiffs where the allegedly defamatory statements touch upon a matter of public concern. *See Wells v. Liddy*, 186 F.3d 505, 532 n.21 (4th Cir. 1999). A statement is deemed substantially true for purposes of defamation actions where "the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991) (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (Cal. 1936)). Further, a statement will not be considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation omitted). Thus, minor or irrelevant inaccuracies will not render a statement materially false.

Plaintiff unsuccessfully attempts to show the material falsity of the allegedly defamatory statements. First, for instance Plaintiff challenges the allegation that he had access to anthrax. Plaintiff points out that he only had access to a storage closet at Fort Detrick in which wet anthrax was kept, but that he did not know that anthrax was contained therein. Plaintiff contends that this fact, if taken as true, proves the material falsity of the statement that Plaintiff had access to the Fort Detrick Labs where anthrax was kept. This Court disagrees. This

is a case of an irrelevant inaccuracy, one in which pleaded truth would not have a different effect on the mind of the reader. *See Masson*, 501 U.S. at 517. The allegation that Plaintiff had access to anthrax is not rendered false simply because Plaintiff did not know he had access to anthrax. The fact that it was wet anthrax as opposed the to dry anthrax used in the anthrax mailings would likely not change the mind of the ordinary reader. A failure to include such a qualification does not form the basis for liability in a defamation action of this type.

Plaintiff next contends that the allegation that he had expertise in dry biological weapon agents is materially false because he has never made dry anthrax, has never done laboratory research on dry anthrax, and does not know how to make dry anthrax. Plaintiff's own assertions of what he knows or does not know cannot create a triable issue on a motion for summary judgment where there is substantial evidence that Plaintiff did in fact have extensive knowledge about biological weapons and agents. Furthermore, the record shows that Plaintiff touted himself as having working knowledge of wet and dry biological weapon agents, and even bragged to a colleague about his ability to make anthrax.

Plaintiff also challenges the statement that he had access to an isolated residence and gave Cipro to people who visited the residence. Plaintiff offered testimony of the owner of the residence in question, who testified that Plaintiff never visited the home without the owner, and therefore did not have unrestricted access. This fact does not alter the substantial truth of the statement that Plaintiff visited the residence, and thus had access to the

residence. Furthermore, although Plaintiff denies that he ever gave Cipro to anyone at the residence, the record is undisputed that taking Cipro was discussed during an October 2001 visit to the residence and that Plaintiff had dispensed Cipro to multiple persons before that weekend. Whether Plaintiff dispensed Cipro while at the residence or at some other point does not alter the gist of the published statement in any material way.

Plaintiff also challenges the statement that he failed three polygraph examinations, but he has not come forth with evidence sufficient to show that the published statement is materially false. Plaintiff contends that he only took one polygraph examination and that he did so voluntarily. However, it is undisputed that the FBI administered at least one polygraph examination that involved more than one test sequence. It is also undisputed that Plaintiff retained his own polygrapher in 2002. The FBI's continuing interest in Plaintiff even after the polygraph exam provides circumstantial evidence that the examination did not extinguish suspicion of Plaintiff. Thus, Plaintiff cannot show that this statement, even if inaccurate as to the exact number of polygraph examinations administered, is materially false.

Finally, Plaintiff challenges the statement that his private writings showed animus to federal agencies. Plaintiff claims that one writing in particular only showed dissatisfaction with one individual, an individual who was instrumental in suspending his security clearance. However, Plaintiff also authored a later writing, in which he described the government's conclusions with respect to a CIA

security decision as dated and illogical. Plaintiff has offered no evidence to contradict the veracity of these facts, or of the underlying gist that Plaintiff was displeased with the government's decision to terminate his security clearance.

Based on the foregoing, Plaintiff cannot carry his burden of proving the material falsity of any of these statements as a matter of law. Accordingly, Defendant is entitled to summary judgment with respect to Count Two on this ground.

Plaintiff's third Count alleges intentional infliction of emotional distress. Under Virginia law, to recover for intentional infliction of emotional distress, four elements must be proved: "(1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable; (3) there was a causal connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress was severe." *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974).

As set forth above, Plaintiff cannot prevail on his defamation claim and is unable to prove the elements necessary to recover for intentional infliction of emotional distress. First, Plaintiff cannot make the requisite showing that Defendant intentionally or recklessly caused him severe emotional distress. This showing may be made by evidence that Defendant specifically intended to cause him severe distress or acted recklessly with respect to whether its conduct would cause his such severe distress. *See, e.g., Womack*, 210 S.E.2d at 148. Plaintiff has not made such a showing. In fact, the record shows that Defendant made efforts to avoid implicating his guilt. Mr. Kristof reminded readers to

assume Plaintiff's innocence, and highlighted the fact that Plaintiff was viewed by his family and friends as a patriot who could not have perpetrated the crime in question. The record is void of any evidence tending to show that Mr. Kristof intended to cause Plaintiff severe distress or that he was reckless in this regard.

Finally, Plaintiff cannot prove that Defendant's conduct was sufficiently outrageous. Plaintiff has failed to satisfy his burden of showing that Defendant engaged in any form of misconduct. Defendant did not act with malice when it published Kristof's columns. Additionally, Mr. Kristof cautiously worded the columns to indicate that Plaintiff was to be presumed innocent, and declined to reveal the true identity of Plaintiff until the Plaintiff himself publicly responded to the allegations. Therefore, Plaintiff cannot satisfy his burden as to Count Three of his complaint.

Considering all inferences in the light most favorable to Plaintiff, there is no evidence that would allow a jury to find that Defendant defamed Plaintiff or intentionally caused him severe emotional distress. Thus, Defendant is entitled to summary judgment on all counts.

An appropriate Order shall issue.

Claude M. Hilton

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

STEVEN J. HATFILL, Plaintiff

v.

THE NEW YORK TIMES COMPANY, Defendant.

Civil Action No. 04-0807

January 30, 2007 Filed

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED and this case is DISMISSED.

/S/

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

January 30, 2007

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

STEVEN J. HATFILL, Plaintiff

v.

THE NEW YORK TIMES COMPANY, Defendant.

Civil Action No. 1:04cv807 (CMH/LO)

October 20, 2006, Decided
October 20, 2006, Filed

Before: Liam O'GRADY, United States Magistrate Judge.

O'GRADY, United States Magistrate Judge.

ORDER

Upon consideration of the pleadings and for good cause shown, it is

ORDERED that Plaintiff's Motion to Compel the Identity of Defendant's Confidential Sources (Dkt. 83) is GRANTED. Plaintiff has brought this defamation action against Defendant, after Defendant published a series of columns alleging that Plaintiff was involved in the anthrax attacks which killed five people in 2001. Pursuant to 28

U.S.C. § 1332, this action comes to this Court under its diversity jurisdiction. On July 13, 2006, Plaintiff deposed Nicholas Kristof, the author of the columns published by Defendant. During that deposition, Plaintiff questioned Mr. Kristof about his sources for the columns and Mr. Kristof refused to identify five sources, whom he had promised confidentiality.[1]

Confidential Sources #2 and #3 were identified during Kristof's deposition as employees of the F.B.I. directly involved in the government's anthrax investigation. These sources provided Mr. Kristof with information or confirmed existing information regarding Plaintiff's ability to manufacture anthrax, the belief that Plaintiff had access to an isolated residence, and Plaintiff's results from polygraph tests. Confidential Source #4 was a colleague or perhaps a friend of Plaintiff's who provided Mr. Kristof with his opinion about Plaintiff's patriotism.

Plaintiff contends that his ability to question Mr. Kristof's sources is central to establishing Defendant's degree of fault for publishing the columns about Plaintiff.[2] Plaintiff urges the Court to apply Virginia law to this dispute and thus apply a

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[1] At the time Plaintiff filed his Motion to Compel, Mr. Kristof was withholding the identities of five sources. Since the motion was filed, two of those sources, Confidential Sources #1 and #5, have agreed to release Mr. Kristof from his promise and reveal their identities. Thus, only Confidential Sources #2, #3 and #4 remain the subject of this motion.

[2] The parties disagree on whether Plaintiff is a public figure, requiring him to prove actual malice by Defendant, or not a public figure, requiring him to prove only negligence by Defendant.

balancing test to determine whether Mr. Kristof should be entitled to a qualified reporter's privilege. Plainitff argues that direct examination of these sources will provide evidence regarding the reliability of the information, sources' areas of knowledge and any potential biases, overcoming any reporter's privilege under the balancing test.

Defendant argues that a choice-of-law analysis under Federal Rule of Evidence 501 reveals that New York or Maryland law, rather than Virginia, should govern the claim of privilege and thus, as a reporter, Mr. Kristof's sources are absolutely privileged under either Maryland or New York reporter "shield" statutes.

A. APPLICABLE LAW

In diversity cases, privileges are determined according to the state law that supplies the rule of decision. *See* Fed. R. Evid. 501. Thus, in diversity cases, Rule 501 directs the Court to apply state law, including state conflict-of-law provisions, to the law of privilege. This approach is consistent with the Supreme Court's holding in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) (holding that under the *Erie* doctrine, a federal court must apply the forum's conflict-of-law rules). The Fourth Circuit has not specifically ruled on the meaning of the second sentence of Rule 501. However, when analyzing Rule 501 in the diversity context, other courts have applied the conflict-of-law doctrines of the state in which it sits. *See, e.g., Samuelson v. Susen*, 576 F.2d 546, 550-51 (3rd Cir. 1978) (applying Pennsylvania's conflict-of-law rules to determine whether Ohio's or Pennsylvania's privilege law

applies); *Ghana Supply Commission v. New England Power Co.*, 83 F.R.D. 586, 589 (D. Mass. 1979)(applying the conflict laws of Massachusetts, the forum state); *Union Planters Nat'l Bank v. ABC Records, Inc.*, 82 F.R.D. 472, 473 (W.D. Tenn. 1979). Therefore, since this Court sits in the Commonwealth of Virginia, the Court finds that Virginia law, including Virginia conflicts-of-law, applies to this issue.

Virginia is a traditional state. As a result, "[i]t is well settled that Virginia . . . adheres to traditional conflict-of-law rules, when presented with a choice-of-law question." *Clark v. Clark*, 398 S.E.2d 82, 89 (Va. Ct. App. 1990). "[T]he *lex loci* will govern as to all matters going to the basis of right of action itself, while the *lex fori* controls all that is connected merely with the remedy." *Jones v. Jones*, 431 S.E.2d 33, 34 (Va. 1993) In more modern parlance, "Virginia courts are to determine whether an issue is procedural [*lex fori*] or substantive [*lex loci*] according to its own conflict rules. If the issue is deemed procedural under the conflict of law rules, the court shall apply [*6] its rules and procedure." *Clark*, 398 S.E.2d at 89. Further, on the issue of conflicts, Virginia has explicitly rejected any of the more recent approaches, including the approach advocated by the Restatement (Second) of Conflicts of Laws. *See McMillan v. McMillan*, 253 S.E.2d 662, 664 (Va. 1979).

The Virginia courts have not spoken specifically on the issue of whether the law of privilege is procedural or substantive. They have, however, provided guidance on how a Virginia court would classify the law of privilege, if it had the opportunity

to consider the issue. In Virginia, "the best rule seems to be that the rights of the parties with respect to their causes of action are governed by *lex loci*, while the admissibility of evidence and the enforcement of those rights are governed by the *lex fori*." *Baise v. Warren*, 164 S.E. 655, 656 (Va. 1932).[3] Further, the Virginia court has stated that "all questions of procedure, burden of proof and sufficiency of evidence" are considered procedural. *D.T. Vicars v. Atlantic Discount Co., Inc.*, 140 S.E.2d 667, 670 (Va. 1965). Thus, it appears to this Court that for the reporter's privilege, a common law privilege under Virginia law, is a question of evidence.[4] Thus, this Court finds the law of privilege,

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[3] Defendant contends that granting this motion will strip Mr. Kristof of his right to protect his sources. As first glance, such a "right" might make it appear as though the reporter's privilege should be governed by *lex loci*. However, the Virginia rule seems to only consider the "rights of the parties with respect to their causes of action" and Mr. Kristof is only a third-party to this dispute. Thus, the existence or lack thereof of a third-party's rights are not a substantive issue under Virginia choice-of-law rules.

[4] Defendant contends that the law of privilege should be treated as substantive and provides *McCauley v. Purdue Pharma, L.P.*, 224 F. Supp.2d 1066 (W.D.V.A. 2002) as its support. While the federal court in *McCauley* did find that the physician-patient privilege was substantive under Virginia choice-of-law rules, this case is distinguishable. First, the court states that the Virginia physician-patient privilege did not exist under state common law and was enacted as a qualified statutory privilege, under Va Code Ann. § 8.01-399. The *McCauley* court also noted that the "Virginia Supreme Court has held that this statute not only sets out a rule of evidence, but it also provides grounds for a cause of action against any practitioner who discloses a patient's medical records in violation of it." *Id.* at 1068. Virginia has not enacted a statutory privilege related to the reporter's privilege, nor has the Virginia General Assembly

absent an applicable statute, is governed by procedural or *lex loci* rules[5] and would therefore apply the Virginia common law regarding the reporter's privilege. The Court also takes note that Virginia would not be the only state to treat this type of privilege as procedural.[6]

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created a cause of action against a reporter who discloses a source's identity. Further, Virginia has developed common law related to a qualified privilege for reporters. *See Philip Morris Co. Inc. v. American Broadcasting Co. Inc.*, 1995 WL 301428 (Va. Cir. Ct.1995). Thus, Court finds *McCauley* unpersuasive.

[5] A leading treatise on federal practice and procedure also reports that this decision conforms with the older, or more traditional, choice-of-law rules. "[T]he older view was that evidence was procedural and fell, therefore, within the principle that matters of procedure were governed by the law of the forum. The original Restatement had no provision dealing with privileges; apparently they were to be dealt with under the rule that in matters of evidence the law of forum governs. Though this approach has been criticized, it seems defensible if one views privileges as a restriction on the power of the courts to compel testimony . . . . [T]here is no reason why the local court should have its power to elicit evidence curtailed because another state has decided to limit the power of its courts and the evidence sought has some connection with the state." State Law Proviso-Choice of Law, 23 Fed. Prac. & Proc. Evid. § 5435 (2006).

[6] In *Union Planters National Bank of Memphis v. ABC Records, Inc.*, the federal court, in a diversity action, followed Rule 501 and used Tennessee choice-of-law rules to determine whether to apply Tennessee or California law to the issue of attorney-client privilege. 82 F.R.D. 472 (W.D. Tenn. 1979). The court decided that Tennessee would "hold that in the present situation the attorney-client privilege is a question of evidence and that in determining the scope and validity of the privilege the law of Tennessee would govern." *Id.* at 473. Although Tennessee had embodied its common law rule of attorney-client privilege in a statute, the legislature concerned themselves only with matters

B. REPORTER'S PRIVILEGE UNDER VIRGINIA LAW

Under Virginia law, reporters have a qualified privilege against disclosure of confidential sources in public figure defamation cases. *See Philip Morris Co. Inc. v. American Broadcasting Co. Inc.*, 1995 WL 301428 (Va. Cir. Ct.1995). Per the guidance of *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Virginia court found that it must balance the interests involved when compelling the identification of confidential sources. *Id.* In doing so, the Virginia courts have applied the three-part balancing test adopted by the Fourth Circuit in *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986). *See Philip Morris*, at *6; *see also Clemente v. Clemente*, 2001 WL 1486150 (Va. Cir. Ct. 2001).

Under the *LaRouche* test, the court considers: "(1) whether the information is relevant, (2) whether the information can be obtained by alternate means, and (3) whether there is a compelling interest in the information." *LaRouche*, 780 F.2d at 1139. Applying the facts of this case to the *LaRouche* test, the Court finds that the balance tips in favor of disclosure.

In *Philip Morris*, the Virginia court found that information about the confidential source is relevant to the state of mind of the reporter at the time the

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of evidence and did not create a cause of action. Therefore, the federal court found this statute to be a matter of procedural law under the Tennessee choice-of-law rules. *See also Ghana Supply Commission v. New England Power Co.*, 83 F.R.D. 586, 589 (D. Mass. 1979) (looking to the conflicts law of the forum state and holding that questions of privilege are procedural under Massachusetts law).

reporter made the allegedly defamatory statements as well as relevant to the credibility of published statements resulting from information provided by the source. *Id.* at *8. Here, Defendant has asserted that it acted without the requisite intent. In order for Plaintiff to meet its burden in the defamation case and offer evidence as to the reporter's state of mind, Plaintiff needs an opportunity to question the confidential sources and determine if Mr. Kristof accurately reported information the sources provided. Further, Plaintiff contends that there is some question as to the accuracy of Mr. Kristof's reporting. Plaintiff has deposed a formerly confidential source, Dr. Barbara Rosenberg, and discovered that her testimony contradicts Mr. Kristof's testimony regarding what Dr. Rosenberg told him. In addition, Defendant contends that Confidential Source #4's information is not relevant because the source said primarily positive things about Plaintiff. If this is true and these statements were left out of the article or if Confidential Source #4 made statements which cast doubt on Kristof's allegation that Plaintiff was the anthrax mailer, then the information from Confidential Source #4 is relevant to Plaintiff's case. As Plaintiff needs to acquire a full understanding of Mr. Kristof's state of mind and verify the accuracy of the statements from the confidential sources, the information is central to this dispute and thus relevant under the *LaRouche* test.

Plaintiff contends that it can not determine the identities of the confidential sources through alternate means, because Mr. Kristof has not provided enough identifying information. For example, although Plaintiff knows that Confidential

Sources #2 and #3 are employees of the F.B.I., hundreds of agents and employees of the F.B.I. have worked on the anthrax investigation. Thus, Plaintiff argues that deposing all of these individuals to determine which two are the confidential sources would be impossible. In addition, Plaintiff has served a Rule 30(b)(6) deposition on Defendant asking for a representative who knows the identities of the sources, and Defendant has only identified Mr. Kristof. Thus, the Court is in agreement with Plaintiff that this information is not available by means other than compelled disclosure.

The final part of the *LaRouche* test considers whether there is a compelling interest in the information. Defendant argues that Plaintiff's interest has not ripened into a "compelling" one since Defendant has not placed either the information provided by the sources or the sources themselves at issue. Thus, Defendant argues that determination of the issue should be deferred until such time as the record of Plaintiff's need is more fully developed. The close of discovery is pending. Under Defendant's view when Defendant decides to put the confidential sources or their information at issue, then the Court would need to reopen discovery to allow Plaintiff time depose the confidential sources. This is not an acceptable solution. Rather, as demanded by *Branzburg*, the Court must make a case-by-case analysis of the needs of the plaintiff. 408 U.S. 665 (1972). In this case, the Court finds that even if Defendant does not place the confidential sources or their information at issue, Plaintiff may need to do so in order to effectively prove his case.

The Court understands the need for a reporter to be able to credibly pledge confidentiality to his sources. Confidential sources have been an important part of journalism, which is presumably why Virginia recognizes a qualified reporter's privilege in the first place. But that privilege must be balanced against the rights of a plaintiff and in Virginia, this balance is embodied by the *LaRouche* test. Thus, after balancing the burdens to both sides, the Court finds that the balance favors disclosure. Thus, it is ORDERED that Defendant shall reveal the identity of Confidential Sources #2, #3 and #4, to Plaintiff no later than Wednesday, October 25, 2006.

Entered this 20th day of October, 2006.

Liam O'Grady

United States Magistrate Judge

Alexandria, Virginia

APPENDIX F

The New York Times

Section A; Column 6; Page 21

January 4, 2002, Friday
Late Edition, Final

PROFILE OF A KILLER

By Nicholas D. KRISTOF

I think I know who sent out the anthrax last fall.

He is an American insider, a man working in the military bio-weapons field. He's a skilled microbiologist who did not aim to kill anybody or even to disrupt the postal system. Rather, he wanted to sow terror. Like many in the bio-warfare field, he felt that the government was not sufficiently attuned to the risks of anthrax, so he seized upon the opportunity presented by Sept. 11 to get more attention and funding for bio-terror programs like those that have been his career.

How do I know all this? Well, I don't exactly. But talk to the people in the spooky world of bio-terror awhile, sop up the gossip and theories, and as you put the clues together -- as bio-terror experts and F.B.I. officials are now doing -- a hazy picture seems to come into focus. It's not a certainty but an

educated guess, circulating among many who know their business.

"I think there are on the order of 100 people who could have done it, who have the access to the spores and the technical expertise to have done it," says one man with long experience in the shadows of the United States bio-defense program. "I've got to admit that I could be a suspect. I've been interviewed by the F.B.I."

The emerging image of the killer that many of the experts see (but not all; anthrax experts agree about as much as economists do) is precisely the opposite of the perpetrator whom we initially imagined. Our first impulse when catastrophes happen is to look for foreigners to round up, as we did after the Oklahoma City bombing and after the crash of Flight 800. The Bush administration tried hard to find evidence to pin the anthrax attacks on Iraq.

In fact, many experts believe that the killer is tied to the American bio-weapons program because the anthrax he sent out is genetically identical to the anthrax kept by the United States Army. A microbiologist named Paul Keim is helping the authorities compare the genetic fingerprint of the mailed anthrax, and every indication is that it derives at least indirectly from the mother lode of the military strain, kept at Fort Detrick, Md.

The mailed anthrax is also astonishingly pure and equivalent (in spore size and concentration) to the best the American Army ever achieved. Making anthrax in a dry powdered form of this quality is difficult, and beginning in 1959 took 900 workers in the "hot" area of Fort Detrick years of effort (and two

accidental deaths, including that of an unlucky electrician who changed light bulbs at the wrong time). Thus it seems that the murderer had access not only to the American military germs but also to some knowledge of the American military method of preparing it in its dry form.

Why do specialists agree that the murderer was not trying to kill anybody? Because he taped the envelopes tightly, and as of September nobody expected that the spores could leak through envelopes. Moreover, each of the letters that has been recovered announced that the substance was anthrax and advised the recipient to take antibiotics.

"I don't think that he was trying to kill anybody," said Barbara Hatch Rosenberg, a microbiologist who has studied the attacks for the Federation of American Scientists. "I think the motive was to create public fear, to raise the profile of biological warfare."

The F.B.I. may already have talked to the killer. There are not that many people with the access to germs, the knowledge and an anthrax vaccine booster shot in the last year. But the murderer showed a knowledge of forensics (apparently not licking a stamp or envelope, for example, to avoid leaving DNA), and it may be very difficult to move from suspicions to sufficient proof for an arrest.

Washington has been pressing Russia, Pakistan and other countries, quite rightly, to improve their control of germs, chemicals and nuclear weapons. But one of the lessons of the anthrax investigation is that the first thing we need to do to feel safer is put our own house in order. It is appalling that we

cannot even determine which labs have exchanged anthrax with Fort Detrick.

Terrorism and laxity, it seems, afflict not only foreigners with different complexions and religions, but -- in exceptional cases -- perhaps also those with white lab coats and military haircuts.

APPENDIX G

The New York Times

Section A; Column 5; Page 25

May 24, 2002, Friday
Late Edition, Final

CONNECTING DEADLY DOTS

By Nicholas D. KRISTOF

Why didn't the Bush administration connect the dots and take aggressive measures before 9/11?

For the same reason we're not doing so today: distractions and a lack of urgency. Forget about the blame game -- for it's just that kind of distraction. It's more important to look ahead and try to block the next attack. Where are the dots today?

One dot is Osama bin Laden's fervent efforts to obtain bio-weapons, reflected in the lab he was building near Kandahar, Afghanistan, to produce anthrax.

Another dot is Iraq. Hazem Ali, a senior Iraqi virologist involved in his country's bio-weapons program, has admitted working with camelpox virus. It's a puzzling choice for a bio-weapon because it's a mild disease -- except, as Jonathan Tucker notes in his book "Scourge," Iraq may be genetically

engineering camelpox into something closer to smallpox. A scientist who once worked in the Soviet bio-weapons program told me of a visit by Iraqi scientists inquiring about genetic engineering of germs.

A third dot is our vulnerability. The Brentwood mail-sorting facility in Washington is still closed because of contamination, as is the Hamilton Township processing center in New Jersey. Just 100 anthrax letters, if mailed around the nation, could close down the U.S. postal system.

A fourth is our failure to capture the anthrax killer, suggesting to Iraq and other potential perpetrators that they might get away with an attack.

So connect these dots and what do they suggest? A biological threat that requires much more vigorous and urgent countermeasures.

Richard Danzig, a bioterror expert and former secretary of the Navy, noted that the anthrax attacks in the fall could be thought of as 5/11: 5 people died, and 11 were infected with inhalation anthrax. Today people worry more about 9/11 scenarios than about 5/11 attacks -- even though a bioterror attack could be incomparably more devastating.

"The more significant national security issue is 5/11," Mr. Danzig said. "The risk of recurrence is high, and could involve anything from a few casualties to tens of thousands. Accordingly, I think this is urgent."

The government once conducted an experiment using a Navy ship two miles off San Francisco to release harmless spores that had the same size and

weight as anthrax. Experts tracked the spores and concluded that had this been anthrax, several hundred thousand people might have died -- although no one would have been aware of the attack until the victims developed fevers four days later.

One of the first steps we can take to reduce our vulnerability is to light a fire under the F.B.I. in its investigation of the anthrax case. Experts in the bioterror field are already buzzing about a handful of individuals who had the ability, access and motive to send the anthrax.

These experts point, for example, to one middle-aged American who has worked for the United States military bio-defense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attack.

I say all this to prod the authorities, for although the F.B.I. has known about this handful of people since October, it has been painstakingly slow in its investigation. Let's hope it will pick up the pace, for solving the case would reduce our vulnerability to another attack.

At a policy level, how are we doing at reducing our vulnerability?

"I don't think anything significant has been done to reduce our vulnerability just yet, aside from creating greater awareness," said Barbara Hatch Rosenberg, a microbiologist who studies bioterrorism for the Federation of American Scientists.

So what should be done? Experts offer suggestions like these:

Smallpox vaccination should begin on a voluntary basis.

Air filtration should be upgraded in landmark buildings. Humidity should be kept above 20 percent so that particles will clump together and aerosol attacks are less effective.

Germ detectors developed by the military should be installed in Grand Central Terminal and elsewhere in New York City. These detectors don't work well, but they are being used at key locations in Washington -- though not in New York. The message seems to be: "Pentagon to City: Drop Dead."

APPENDIX H

The New York Times

Section A; Column 1; Page 21

July 2, 2002, Tuesday
Late Edition, Final

ANTHRAX? THE F.B.I. YAWNS

By Nicholas D. KRISTOF

The F.B.I.'s bumbling before 9/11 is water under the bridge. But the bureau's lackadaisical ineptitude in pursuing the anthrax killer continues to threaten America's national security by permitting him to strike again or, more likely, to flee to Iran or North Korea.

Almost everyone who has encountered the F.B.I. anthrax investigation is aghast at the bureau's lethargy. Some in the biodefense community think they know a likely culprit, whom I'll call Mr. Z. Although the bureau has polygraphed Mr. Z, searched his home twice and interviewed him four times, it has not placed him under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters.

This is part of a larger pattern. Astonishingly, the F.B.I. allowed the destruction of anthrax stocks

at Iowa State University, losing what might have been valuable genetic clues. Then it waited until December to open the intact anthrax envelope it found. The F.B.I. didn't obtain anthrax strains from various labs for comparison until March, and the testing is still not complete. The bureau did not systematically polygraph scientists at two suspect labs, Fort Detrick, Md., and Dugway Proving Ground in Utah, until a month ago.

Perhaps it's a cheap shot for an armchair detective to whine about the caution of dedicated and exceptionally hard-working investigators. Yet months pass and the bureau continues to act like, well, a bureaucracy, plodding along in slow motion. People in the biodefense field first gave Mr. Z's name to the bureau as a suspect in October, and I wrote about him elliptically in a column on May 24.

He denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot. Some of his polygraphs show evasion, I hear, although that may be because of his temperament.

If Mr. Z were an Arab national, he would have been imprisoned long ago. But he is a true-blue American with close ties to the U.S. Defense Department, the C.I.A. and the American biodefense program. On the other hand, he was once caught with a girlfriend in a biohazard "hot suite" at Fort Detrick, surrounded only by blushing germs.

With many experts buzzing about Mr. Z behind his back, it's time for the F.B.I. to make a move: either it should go after him more aggressively, sifting thoroughly through his past and picking up

loose threads, or it should seek to exculpate him and remove this cloud of suspicion.

Whoever sent the anthrax probably had no intention of killing people; the letters warned recipients to take antibiotics. My guess is that the goal was to help America by raising preparedness against biological attacks in the future.

So it seems fair to ask the F.B.I. a few questions:

Do you know how many identities and passports Mr. Z has and are you monitoring his international travel? I have found at least one alias for him, and he has continued to travel abroad on government assignments, even to Central Asia.

Why was his top security clearance suspended in August, less than a month before the anthrax attacks began? This move left him infuriated. Are the C.I.A. and military intelligence agencies cooperating fully with the investigation?

Have you searched the isolated residence that he had access to last fall? The F.B.I. has known about this building, and knows that Mr. Z gave Cipro to people who visited it. This property and many others are legally registered in the name of a friend of Mr. Z, but may be safe houses operated by American intelligence.

Have you examined whether Mr. Z has connections to the biggest anthrax outbreak among humans ever recorded, the one that sickened more than 10,000 black farmers in Zimbabwe in 1978-80? There is evidence that the anthrax was released by the white Rhodesian Army fighting against black guerrillas, and Mr. Z has claimed that he participated in the white army's much-feared Selous

Scouts. Could rogue elements of the American military have backed the Rhodesian Army in anthrax and cholera attacks against blacks? Mr. Z's resume also claims involvement in the former South African Defense Force; all else aside, who knew that the U.S. Defense Department would pick an American who had served in the armed forces of two white-racist regimes to work in the American biodefense program with some of the world's deadliest germs?

What now? When do you shift into high gear?

APPENDIX I

The New York Times

Section A; Column 6; Page 19

July 12, 2002, Friday
Late Edition, Final

THE ANTHRAX FILES

By Nicholas D. KRISTOF

When someone expert in bio-warfare mailed anthrax last fall, it may not have been the first time he had struck.

So while the F.B.I. has been unbelievably lethargic in its investigation so far, any year now it will re-examine the package that arrived on April 24, 1997, at the B'nai B'rith headquarters in Washington. The package contained a petri dish mislabeled "anthracks."

The dish did not contain anthrax. But a Navy lab determined that it was bacillus cereus, a very close, non-toxic cousin of anthrax used by the Defense Department.

Anybody able to obtain bacillus cereus knew how to spell "anthrax." An echo of that deliberate misspelling came last fall when the anthrax letters suggested taking "penacilin."

The choice of B'nai B'rith probably was meant to suggest Arab terrorists, because the building had once been the target of an assault by Muslim gunmen. In the same way, F.B.I. profilers are convinced that the real anthrax attacks last year were conducted by an American scientist trying to pin the blame on Arabs.

In a column on July 2 I wrote about "Mr. Z," an American bio-defense insider who intrigues investigators and whose career has been spent in the shadowy world of counterterror and intelligence. He denies any involvement in the anthrax attacks.

On the date that the perpetrator chose for the B'nai B'rith attack, a terrorism seminar was under way in the Washington area and Mr. Z seemed peeved that neither he nor any other bio-defense expert had been included as a speaker. The next day, Mr. Z sent a letter to the organizer saying that he was "rather concerned" at the omission and added: "As was evidenced in downtown Washington D.C. a few hours later, this topic is vital to the security of the United States. I am tremendously interested in becoming more involved in this area. . . ."

Over the next couple of years, Mr. Z used the B'nai B'rith attack to underscore the importance of his field and his own status within it. "Remember B'nai B'rith," he noted at one point. In examples he gave of how anthrax attacks might happen, he had a penchant for dropping Arab names.

The F.B.I. must be on top of the B'nai B'rith episode, right? Well, it was told about it months ago. But B'nai B'rith says it hasn't been asked about the incident by the F.B.I.

The authorities seem equally oblivious to another round of intriguing anthrax hoaxes in February 1999. As with last fall's anthrax letters, a handful of envelopes with almost identical messages were sent to a combination of media and government targets including The Washington Post, NBC's Atlanta office, a post office in Columbus, Ga. (next to Fort Benning, an Army base), and the Old Executive Office Building in Washington (where Mr. Z had given a briefing three months earlier).

I found a local policeman in Columbus willing to dig out his file on that 1999 anthrax hoax. There are several similarities with last fall's mailing. For example, one page of the 1999 letter says, in big, bold capitals: "WARNING: THIS BUILDING AND EVERYTHING IN IT HAS BEEN EXPOSED TO ANTHRAX. CALL 911 NOW AND SECURE THE BUILDING. OTHERWISE THE GERM WILL SPREAD."

Last fall's letters are also in bold capitals and use similar language patterns.

In contrast to the 1997 package with fake anthrax gelatin, the 1999 letters each contained a teaspoon of fake anthrax powder (roughly the same amount as of real anthrax in 2001). That's interesting because as of 1997, U.S. bio-defense scientists were working basically only with wet anthrax, while by 1999 some had experimented with making powders.

For example, Mr. Z apparently learned about powders during those two years. His 1999 resume adds something missing from the 1997 version: "working knowledge of wet and dry BW biological

warfare agents, large-scale production of bacterial, rickettsial and viral BW pathogens and toxins."

Two outside consultants used by the F.B.I. to examine documents in the anthrax case, Don Foster and Mark Smith, both say they have not been shown the 1997 or 1999 hoax letters. The 1999 envelopes carried stamps, which may have been licked.

It would be fascinating to know whose DNA that is. Perhaps when the F.B.I. is finished defending itself from charges of lethargy, it will check.

APPENDIX J

The New York Times

Section A; Column 6; Page 17

July 19, 2002, Friday
Late Edition, Final

CASE OF THE MISSING ANTHRAX

By Nicholas D. KRISTOF

It's bad enough that we can't find anthrax hidden in the Iraqi desert. But it turns out that we also misplaced anthrax and Ebola kept in a lab outside Washington D.C.

Internal Army documents about the U.S. biodefense program describe missing Ebola and other pathogens, vicious feuds, lax security, cover-ups and a "cowboy culture" beyond anyone's scrutiny. Moreover, germ warriors in the C.I.A. and the Defense Department decided -- without bothering to consult the White House -- to produce anthrax secretly and tinker with it in ways that arguably put the U.S. in violation of the Biological Weapons Convention.

It's time for Congress or an outside commission to investigate our nation's biodefense program and establish oversight.

"Shenanigans have been going on," declares one internal Army memo about the labs at ground zero of the biodefense world: Usamriid, the acronym for the U.S. Army Medical Research Institute of Infectious Diseases, based at Fort Detrick, Md.

The 400 pages of documents, which I've obtained and which were described by The Hartford Courant earlier this year, quote a newly arrived officer named Michael Langford as saying in about 1992 that he found "little or no organization," "little or no accountability," "a very lax and unorganized system" and signs of covert work and cover-ups.

Mr. Langford requested an inventory of pathogens acquired in 1991. The resulting memo shows that 62 samples had vanished, including Ebola, hantavirus, anthrax, S.I.V. (the monkey version of the virus that causes AIDS), and several described only as "unknown."

Usamriid says that it rechecked this year and was able to account for virtually all of the missing specimens except one set that would have been irradiated to render it harmless. But a decade's delay in bothering to look for missing Ebola seems a bit much, and conversations with scientists who have worked at Usamriid do not inspire confidence (although, in fairness, many who talk publicly have lawsuits pending against the lab).

"When I was laid off, I walked out for three days in a row with boxes, and no one looked inside them," recalled Richard Crosland, who worked at Usamriid from 1986 to 1997. "I was there for 11 years, and never once did anyone ask, 'Where is the substance you ordered?'

"I could have walked out with it when I left, and no one would have known. I didn't, but I could have. 7-Eleven had better inventory control. And I was working with botulinum, which is one of the deadliest substances on earth.

"If you couldn't find a microscope, you were in real trouble. But if you misplaced five micrograms of botulinum that could kill thousands of people, nobody would notice."

In truth, many microbiology labs are pretty chaotic, and ultimately labs have to pick reliable people and then trust them. But that's what piqued my interest in Usamriid in the first place -- my research about a man I've called "Mr. Z," who has been interviewed four times by the F.B.I. and whose home has been searched twice in connection with the anthrax investigation. Usamriid hired Mr. Z in 1997 to work with Ebola and Marburg viruses, although he had spent years in the armed forces of Rhodesia and apartheid South Africa.

Most researchers at Usamriid are dedicated patriots who could earn more in the private sector. When Mr. Z left Usamriid in 1999, he was making $58,000 a year -- and jumped to a $150,000-a-year job with a private contractor. Many biodefense scientists risk their lives working with deadly germs to improve vaccines for American troops, and they deserve our gratitude.

Still, the Army documents indisputably point out serious problems. They recount incidents in 1992 when someone appeared to be working secretly with anthrax at night and on weekends and then trying to cover it up. Memos describe how someone tried to

roll back a numerical counter on an electron microscope to hide his work with anthrax.

As recently as April of this year, anthrax spores were found in a hallway and administrative area of Usamriid -- shortly after Senator Mary Landrieu, a Louisiana Democrat, visited the complex. Anthrax spores seem to have it in for Democratic senators.

APPENDIX K

The New York Times

Section A; Column 1; Page 19

August 13, 2002, Tuesday
Late Edition, Final

THE ANTHRAX FILES

By Nicholas D. KRISTOF

It's time for me to come clean on "Mr. Z."

Since May, I've written periodically about a former U.S. Army scientist who, authorities say privately, has become the overwhelming focus of the investigation into the anthrax attacks last fall. I didn't name him.

But over the weekend, Mr. Z named himself: He is Steven J. Hatfill, 48, a prominent germ warfare specialist who formerly worked in the Army labs at Fort Detrick, Md. Dr. Hatfill made a televised statement on Sunday, describing himself as "a loyal American" and attacking the authorities and the media for trying "to smear me and gratuitously make a wasteland of my life."

The first thing to say is that the presumption of innocence has already been maimed since 9/11 for foreign Muslims, and it should not be similarly

cheapened with respect to Dr. Hatfill. It must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of traditional physical evidence linking him to the attacks.

Still, Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax "fall guy." The authorities' interest in Dr. Hatfill arises from a range of factors, including his expertise in dry biological warfare agents, his access to Fort Detrick labs where anthrax spores were kept (although he did not work with anthrax there) and the animus to some federal agencies that shows up in his private writings. He has also failed three successive polygraph examinations since January, and canceled plans for another polygraph exam two weeks ago.

So far, the only physical evidence is obscure: smell. Specially trained bloodhounds were given scent packets preserved from the anthrax letters and were introduced to a variety of people and locations. This month, they responded strongly to Dr. Hatfill, to his apartment, to his girlfriend's apartment and even to his former girlfriend's apartment, as well as to restaurants that he had recently entered (he is under constant surveillance). The dogs did not respond to other people, apartments or restaurants.

Putting aside the question of Dr. Hatfill and the anthrax, there are two larger issues.

First is the F.B.I.'s initial slowness in carrying out the anthrax investigation. Why did it take nine months to call in the bloodhounds, or to read Dr. Hatfill's unpublished novel, "Emergence," which has been sitting in the copyright office since 1998 and

draws on his experiences in South Africa and Antarctica to recount a biological warfare attack on Congress?

Second is the need for much greater care within the U.S. biodefense program. Dr. Hatfill's resume made claims (a Ph.D. degree, work with the U.S. Special Forces, membership in Britain's Royal Society of Medicine) that appear false, but these were never checked.

Moreover, what was a man like Dr. Hatfill who had served in the armed forces of two white racist governments (Rhodesia and South Africa) doing in a U.S. Army lab working with Ebola? With a new wave of funding for smallpox and anthrax research, we must be doubly careful that the spread of pathogens to new labs solves problems rather than creates them.

The White House is putting strong pressure on the F.B.I. to solve the anthrax murders. Top administration officials would love to find an Iraqi connection, but would settle for solving the case. The F.B.I. director, Robert Mueller, is pushing back, saying that nothing would be worse for the bureau than a premature prosecution that would fizzle in court.

To its credit, in the last few months, the bureau has finally picked up its pace. Its experts in Quantico are belatedly examining anthrax hoax letters sent in 1997 and 1999 that bear fascinating resemblance to the real anthrax letters. Investigators are looking at another hoax letter with intriguing parallels to the real one; that hoax was sent to Senator Tom Daschle

from London in mid-November, when Dr. Hatfill was visiting a biodefense center in England.

Partly because of the newfound energy, the F.B.I. has lately been enjoying genuine progress in its anthrax investigation. People very close to Dr. Hatfill are now cooperating with the authorities, information has been presented to a grand jury, and there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him.